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*Before the*
**FEDERAL COMMUNICATIONS COMMISSION** JUL 18 1997
**Washington, DC 20554**

OFFICE OF THE SECRETARY

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| In the Matter of | ) | |
| | ) | |
| Advanced Television Systems | ) | |
| and Their Impact upon the | ) | MM Docket No. 87-268 |
| Existing Television Broadcast | ) | |
| Service | ) | |

**OPPOSITION TO PETITIONS FOR RECONSIDERATION**

Media Access Project, the Center for Media Education, Consumer Federation of America, Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters ("MAP *et al.*") respectfully submit this Opposition to the Petitions for Reconsideration filed by several parties to the Commission's *Fifth Report and Order,* FCC No. 97-116 (released April 21, 1997) ("*Fifth R&O*") and *Sixth Report and Order,* FCC No. 97-115 (released April 21, 1997) ("*Sixth R&O*") in the above-referenced docket.

MAP *et al.* will discuss two issues in this Opposition. First, they will address the opposition of five UHF licensee Petitioners[1] (hereinafter "DeSoto *et al.*") to the Commission's core spectrum plan, and specifically its decision to recover channels 60-69 for other uses. Second, MAP *et al.* will address the proposals by the Association of America's Public Television Stations and Public Broadcasting Service ("APTS/PBS") to make so-called "overnight" switches to digital TV and to use part of the capacity of their digital channels for revenue-generating purposes.

[1]These Petitioners are: DeSoto Broadcasting, Inc.; Minnesota Broadcasting, Inc.; Pacific FM, Inc.; WLEX-TV, Inc.; and WWAC, Inc.

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## I. ADOPTION OF THE CORE SPECTRUM PLAN IS BOTH GOOD LAW AND GOOD POLICY.

In nearly identical filings, DeSoto *et al.* challenges the Commission's core spectrum plan, including its decision to reclaim immediately the portion of the spectrum comprising channels 60-69. These Petitioners, however, completely fail to account for the greater overall public benefit that will come from recapture of these channels. DeSoto *et al.*'s assertion that the Commission seeks to reclaim spectrum only to realize auction revenue in violation of Section 309(j)(7) of the Communications Act completely ignores several manifest statements to the contrary in the *Sixth R&O*. And its argument that the allocation plan reneges on an FCC promise to increase UHF stations' service areas is also misguided because the Commission has only sought to replicate station's service areas throughout this proceeding.

### A. The Commission's Decision To Recover Spectrum Does Not Violate Section 309(j).

DeSoto *et al.* argue that the Commission's decision to recover channels 60-69 violates Section 309(j)(7) of the Communications Act, which states that in determining whether "to assign a band of frequencies to a use for which licenses or permits will be issued [by competitive bidding], the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues...." 47 USC §309(j)(7)(A). DeSoto *et al.* contend that the Commission expresses a "willingness" in its *Sixth R&O* "to have the recovered spectrum be put up for auction," and concludes that auctioning this spectrum was the "purpose" of recovering it. *E.g.*, Petition for Reconsideration of DeSoto Broadcasting at 3-4, *quoting Sixth FNOPR* 11 FCCRcd at 10968, 10980 (1996).

DeSoto *et al.*'s argument, however, is based on a flawed reading of the Commission's

*Sixth R&O*. The Commission has not based its public interest finding on the expectation of auction revenues. Instead, the Commission clearly states that its "overarching goals in this phase of the proceeding are to ensure that the spectrum is used efficiently and effectively through reliance on market forces and to ensure that the introduction of digital TV fully serves the public interest." *Sixth R&O* at ¶¶1, 76. To that end, it has reaffirmed the goal stated in the *Sixth FNOPR*, that given its "obligation to manage the spectrum efficiently in the public interest and the increased number of stations that the TV spectrum can accommodate,...it is important that the recovery of spectrum continue to be a key component of [the] implementation of DTV service." *Sixth FNOPR*, 11 FCCRcd at 10977; *Sixth R&O* at ¶76. To the extent that auctions are mentioned at all, it is only within the context of a "future" proceeding that the Commission "will initiate" to determine "***how*** to allocate available spectrum at channels 60-69." *Sixth R&O* at ¶80 (emphasis added).

Moreover, the United States Court of Appeals for the District of Columbia Circuit recently rejected an argument that is nearly identical to that made by DeSoto *et al.* In *Advanced Communications Corp. v. Federal Communications Commission*, the appellants asserted that the Commission erred in denying Advanced's request for an extension to construct and launch a DBS system because the agency improperly considered the revenues to be gained from an auction of Advanced's orbital slots and channels. *Advanced Communications Corp. v. Federal Communications Commission*, No. 95-1551, slip op. at 8-9 (D.C. Cir. May 8, 1996)(unpublished disposition). While the Court noted that the Commission's decision indicated that the agency was ***aware*** that there were auction revenues to be had from the sale of the orbital slots, that awareness was not enough to violate Section 309(j)(7). *Id.* at 9. The Court found that because the agency had

not affirmatively based its decision to deny the extension on the expectation of auction revenues, there was no violation. *Id.* This is much like the case here - while the FCC was aware of the possibility that channels 60-69 could be auctioned in the future, its decision was not ***based upon*** that fact.

### B. The Core Spectrum Plan Is Fully Consistent With The Commission's Promise That Stations Maintain Current Levels Of Service.

The same Petitioners argue that the core spectrum plan is flawed because it does nothing to erase the historical disadvantage faced by UHF stations. DeSoto *et al.* claim that the Commission intended to "erase" these inequities by permitting UHF stations to upgrade their stations with the revenue gained by new digital multichannel and subscription based services. DeSoto *et al.* Petition at 8, *citing Fourth FNOPR*, 10 FCCRcd 10540, 10541 ¶¶4, 9. These Petitioners claim that the core spectrum plan prevents such station improvements because it limits broadcasters to their level of service as of April 3, 1997 and will permit increases in power only if they do not interfere with transmission by other licensees. DeSoto *et al.* Petition at 8. DeSoto *et al.* conclude that UHF stations could find more room to increase their power levels if DTV allotments were licensed to the entire range of channels 2-69. *Id.* at 9.

These commenters' expectations are misplaced. The Commission's *Sixth FNOPR* plainly stated that its goal was to maintain current levels of service, not to expand these levels for UHF licensees. This service replication approach proposed "to the extent possible, [to] allow all existing broadcasters to provide digital TV service to a geographic area that is comparable to their existing NTSC service area." *Sixth FNOPR*, 11 FCCRcd at 10975. The Commission only proposed to allow "stations to maximize or increase their service area where such an increase would not cause additional interference." *Id.* To be sure, the *Fourth FNOPR* did mention the

possibility that broadcasters would be able to offer a mix of several video and non-video services, but it did not specify that one of the Commission's goals in permitting such revenue-enhancing services was the reduction of any UHF-VHF disparity. *Fourth FNOPR*, 10 FCCRcd at 10541.

Of course, MAP *et al.* do not wish to prevent or discourage UHF stations from increasing their signal coverage or otherwise upgrading their facilities. To the contrary, such upgrades will enhance diversity of programming voices. But the *Sixth R&O* correctly balances this goal against the need for spectrum efficiency. The core spectrum plan brings the maximum public benefit, because television service will not be changed greatly, yet additional frequencies would be available for other uses. The Commission explicitly recognized the needs of UHF stations and attempted to accommodate them as much as it found consistent with the public interest. *Sixth R&O* at ¶30. It specified that its core spectrum plan was a compromise approach and allows UHF stations to provide larger DTV service areas than would have been possible under some of the alternatives that had been suggested, such as the "minimum service area" approach advocated by the Joint Broadcasters and Broadcasters Caucus. *Id.*

Furthermore, whatever disparity still remains between UHF and VHF stations has been greatly reduced by mandatory cable carriage. With must-carry, UHF stations will be able to reach two-thirds of their viewers with a signal quality identical to VHF stations in that community. The Supreme Court's recent decision upholding these rules acknowledged that they were designed to protect the very same marginal UHF stations that concern DeSoto *et al.* *Turner Broadcasting System v. Federal Communications Commission*, No. 95-992, (U.S. March 31,

1997)("*Turner II*").[2]

## II. THE COMMISSION SHOULD ALLOW PUBLIC TV STATIONS GREAT FLEXIBILITY IN CONVERTING TO DIGITAL TELEVISION, BUT IT SHOULD NOT PERMIT OVERNIGHT SWITCHES TO OCCUR BEFORE THE END OF THE TRANSITION PERIOD AND SHOULD NOT ALLOW PUBLIC TV FACILITIES TO BE USED FOR ADVERTISER-SUPPORTED PROGRAMMING OR "HOME-SHOPPING."

While estimates vary on the actual costs of converting to DTV, public TV stations must make this conversion under rigid budget constraints and are therefore likely to face more difficulties than their commercial counterparts. Therefore, MAP *et al.* generally support APTS/PBS's request that public TV stations be given flexibility in converting to digital transmission and using additional spectrum capacity to provide ancillary and supplementary services. Petition for Reconsideration of APTS/PBS ("APTS/PBS Petition").

Specifically, while it may be appropriate for the Commission to allow public TV to perform some revenue-generating ancillary services, they must be consistent with public TV's noncommercial nature as defined by Section 399B of the Communications Act, and with the Commission's duty to ensure that provision of these services advances the public interest, conve-

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[2]In a plea for sympathy, DeSoto *et al.* states that "there is a great disparity between the service provided by the large, group or network-owned VHF stations, and the ***independent, locally-owned*** UHF stations in each market....Historically, the owner of a UHF station is typically a small business, or sole proprietorship with limited financial resources." DeSoto *et al.* Petition at 7 (emphasis added). Whatever the historical accuracy of this portrait of UHF ownership, it has little to do with an industry which has consolidated ownership of these stations into many fewer, larger companies. Moreover, many of these supposedly independently managed stations actually delegate programming authority *via* "LMAs" and similar legally questionable schemes. Many UHF stations delegate their programming in another way, by functioning as mere translators for 24-hour home shopping services provided by HSN or Paxson. While some others have more felicitous affiliations with networks such as CBS, Fox, WB, or UPN, such affiliations are no different among group and independent owners, and therefore add little in the way of local programming and viewpoint diversity.

nience, and necessity. 47 USC §§336(a)(2), 399B. Furthermore, while MAP *et al.* support APTS/PBS's proposal to allow public TV stations to make "overnight" switches to digital transmission, these switches should be allowed only on the last day of the transition period.

### A. Public TV Stations Should Be Allowed To Make Overnight Switches Only At The End Of The Digital TV Transition Period.

APTS/PBS seek special relief from the transition requirements, observing that many public TV stations, especially smaller ones, will face great difficulties raising the funds to operate two stations simultaneously. APTS/PBS Petition at 8. Therefore, APTS/PBS propose an alternative transition method that would apply only to public TV stations, an "overnight" switch option. This option would allow public TV licensees, at any point during the transition period, to cease NTSC transmission and immediately begin DTV operation on the same channel. *Id.* at 13. APTS/PBS propose that public TV stations be required to decide whether they will exercise the overnight switch option no later than the deadline for constructing their DTV stations, presently May 1, 2003. *Id.*; *Fifth R&O* at ¶76. At the time they make this decision, they would return their DTV channels, but would be given discretion in determining when actually to make the switch. APTS/PBS Petition at 13.

MAP *et al.* encourage the Commission, if it should permit public TV stations to make overnight switches, to clarify that in no event shall a public TV licensee make the switch earlier than the deadline for the return of NTSC channels, presently in 2006. This deadline was adopted to "lend certainty to the introduction of digital by making clear to the public that analog television service" will be available until a date certain. *Fifth R&O* at ¶98. If a public TV station elects the overnight switch option and performs the switch before the 2006 deadline, those of its viewers that have not yet acquired digital TV sets will be disenfranchised. Requiring these switches to

occur at the end of the transition period will provide viewers with the full amount of time allotted by the FCC to obtain digital-capable TV receivers or converter boxes.

### B. Public TV Stations Should Be Allowed To Provide Ancillary Revenue-generating Services So Long As They Do Not Violate The No-advertising Provision Of 47 USC §399B(b).

APTS/PBS urges the Commission to clarify that its *Fifth R&O* allows public TV stations to offer ancillary and supplementary services on their DTV channels so long as those services do not cause any derogation of the stations' broadcast service. APTS/PBS Petition at 26. Observing that Section 336 of the Telecommunications Act of 1996 ("1996 Act") authorizes the provision of such services, APTS/PBS asserts that, since "neither the statute nor the Commission's rule distinguishes between commercial and noncommercial stations, it would appear that both intended to allow" public TV stations to provide them as well as commercial stations. *Id.* APTS/PBS also notes that its stations are exploring the lease of "excess digital capacity to commercial operators, joint ventures with commercial entities, and other similar revenue generating opportunities." *Id.* at 27.

This proposal, however, is unclear as to what specific programming would be offered and whether it would comport with the requirements of Section 399B of the Communications Act. Although it permits public TV stations to offer their services or facilities in exchange for remuneration, Section 399B prohibits them from making their "facilities available to any person for the broadcasting of any advertisement." 47 USC §399B(b). Section 336 of the 1996 Act does not ***explicitly*** permit noncommercial stations to broadcast advertisements on any ancillary and supplementary services, so APTS/PBS's reading is possible only if the inconsistent requirements of Section 399B were repealed. There is, of course, a general rule that such implicit

repeals are strongly disfavored, and not to be assumed in the course of statutory construction.

MAP *et al.* urge the Commission to grant APTS/PBS's request only in part, and to clarify that any leased or joint venture programming would violate Section 399B if it is advertiser-supported. Naturally, this would include programming that is predominantly utilized for the transmission of sales presentations or program length commercials, such as home shopping or infomercials, or that otherwise encourages or solicits the purchase of goods and services from commercial entities. This would still leave many acceptable, revenue-generating uses for the excess capacity. 47 USC §399B(b)(1).

## CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Reconsideration filed by DeSoto *et al.* Furthermore, the Commission should only grant the APTS/PBS Petition subject to the restrictions that public TV stations perform the overnight conversions no earlier than the last day before the deadline for the return of the NTSC spectrum, and that any facilities made available for revenue-generating purposes may not be used to deliver programming that is advertiser-supported or is predominantly utilized for the transmission of sales presentations or program length commercials. Finally, the Commission should grant all other relief as may be just and proper.

Respectfully Submitted,

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July 18, 1997

## CERTIFICATE OF SERVICE

I, Joseph S. Paykel, certify that on this 18th day of July, 1997, copies of this "Opposition to Petitions for Reconsideration" were served by first class, postage prepaid mail, to the following:

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